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SUPREME COURT OF THE UNITED STATES.

No. 176.

THE UNITED STATES, APPELLANTS,

vs.

EUGENE DIEKELMAN.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 14, 1874.

Reversed
C J

SUPREME COURT OF THE UNITED STATES.

No. 176.

THE UNITED STATES, APPELLANTS,

vs.

EUGENE DIEKELMAN.

APPEAL FROM THE COURT OF CLAIMS.

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1 United States Court of Claims.

E. DIEKELMAN
vs.
THE UNITED STATES. } No. 6176.

Petition.—Filed May 18, 1870.

To the honorable the judges of the Court of Claims:

The petition of E. Diekelman respectfully represents—

That he is, and was at the date of the transactions hereinafter complained of, a subject of His Majesty the King of Prussia, resident at Stralsund, in the kingdom of Prussia, one of the States now composing the North German Union, and which was then and ever since has been in relations of amity with the United States.

That he brings this suit in the Court of Claims under and by virtue of an act of the Congress of the United States, approved May 4, 1870, which is in the words following, to wit:

"Joint resolution to enable the Court of Claims to hear and determine the claim of E. Diekelman, a subject of the King of Prussia.

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of E. Diekelman, a subject of the King of Prussia, for damages for an
2 alleged detention of the ship Essex by the military authorities of the United States at New Orleans, in the month of September, eighteen hundred and sixty-two, be, and is hereby, referred to the Court of Claims for its decision in accordance with law, and to award such damages as may be just in the premises, if he may be found entitled to any damages."

And your petitioner states his claim as follows:

That after the 13th day of May, in the year 1862, when the port of New Orleans was re-opened by proclamation and public notice to the commerce of all friendly nations, which had theretofore been suspended for some time by reason of the possession of the said port by persons in insurrection against the Government of the United States, your petitioner, being the owner of a Prussian merchant-ship called the Essex, dispatched his said ship to the said port, where she arrived about the 27th day of August, 1862.

That after discharging her cargo about the 2d day of September, 1862, the said ship, under a proper permit from the custom-house officers of the United States, and under their supervision, commenced taking in an outward cargo, and having completed the same on the 15th of the same month, the master of the said vessel, Augustus Klatt, on that day applied at the custom-house to the proper officer of the United States for a clearance, but such clearance was by the said officer refused.

That the said master, at divers times thereafter, and from day to day, renewed his application for a clearance, but the same was always refused by the officers of the United States, until the 6th day of October, 1862, when a clearance was given and the said ship was allowed to leave the said port.

That at first no reason was given for the detention of the ship, but subsequently the captain was informed, by direction of the mili-
3 tary authorities of the United States, that certain designated packages, ten in number, which had been shipped on said vessel,

and were said to contain coin bullion and silver-plate, must be landed before the ship could be allowed to sail. To this the captain replied that he could not voluntarily deliver up these goods without the surrender of the bills of lading which he had given to the shippers, but that if the military authorities chose to take them by force no obstacle would be interposed, his object being simply to protect the ship-owner from liability upon the negotiable bills of lading which were outstanding. This reasonable ground taken by the captain was finally acquiesced in by the military authorities, and certain of the packages having been removed from the vessel by force, she was permitted to proceed on her voyage. Your petitioner hereto annexes copies of protests and correspondence, contemporaneous with the transaction, fully detailing all the particulars thereof, and marked Exhibits A to O.

Your petitioner charges that the detention of the ship was wrongful and without just or reasonable cause, and that it caused to your petitioner direct and immediate damage to the amount of eighteen thousand eight hundred and nine dollars in gold, of which the particulars are stated in the annexed schedule, marked Exhibit P. And your petitioner claims that sum, with interest thereon from the 6th day of October, 1862, until paid, as his just damages under the act of Congress hereinbefore recited.

E. DIEKELMAN,
By his agent, JNO. D. McPHERSON.

CARLISLE & McPHERSON,
Attorneys for Petitioner.

4 DISTRICT OF COLUMBIA,
County of Washington:

Before the undersigned, a commissioner, ex-officio, of the Court of Claims, personally appeared John D. McPherson, and made oath that he is the agent of the claimant to prosecute this claim; that to the best of this affiant's information and belief no assignment or transfer of the claim stated in the said petition, of any part thereof, or any interest therein has been made; that the claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsetts; and that he believes the facts stated in the petition to be true.

JAS. O. CLEPHANE,
U. S. Commissioner for the District Columbia, and ex-officio Commissioner of Court of Claims.

5 In the United States Court of Claims, December term, A. D. 1869

E. DIEKELMAN
vs.
THE UNITED STATES. } No. 6176. Filed July 18, 1870.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of eighteen thousand eight hundred and nine dollars in gold, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOMAS H. TALBOT,
Assistant Attorney-General.

6 In the Court of Claims.

EUGENE DIEKELMAN
vs.
THE UNITED STATES. } 6176.

At a Court of Claims held at the Capitol in the city of Washington the third day of November, A. D. 1873, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Eugene Diekelman, claimant, have and recover of and from the United States the sum of thirteen thousand five hundred and ninety-five dollars sixty-five cents, ($13,595\frac{65}{100}$.)

By the court.

7 In the Court of Claims of the United States, Dec. term, 1873.

EUGENE DIEKELMAN
vs.
THE UNITED STATES. } No. 6176.

From the judgment rendered in the above-entitled cause on November 3, 1873, in favor of claimant, the defendants, by their Attorney-General, on the 13th day of December, 1873, make application for and give notice of an appeal to the Supreme Court of the United States, the amount in controversy in said cause exceeding three thousand dollars, to wit, thirteen thousand five hundred and ninety-five dollars and sixty-five cents.

JOHN GOFORTH,
Asst. Atty. General.

Filed Dec. 13, 1873.

Ordered, that the appeal be allowed as prayed for.
By the court.
APRIL 6, 1874.

8 United States Court of Claims.

EUGENE DIEKELMAN
vs.
THE UNITED STATES.

The petitioner claims to be indemnified by the United States for the loss sustained by him by the detention of his vessel in the port of New Orleans for twenty days, in September and October, 1862, by military authority, and the court finds the facts to be:

The claimant, at the time of the occurrence of the matters hereinafter

stated, was, and still is, a subject of the King of Prussia, and was the owner of the ship Essex, and prosecutes this suit under the authority of a joint resolution passed by Congress on the 4th of May, 1870, entitled "Joint resolution to enable the Court of Claims to hear and determine the claim of E. Dickelman, a subject of the King of Prussia." Its words are:

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of E. Dickelman, a subject of the King of Prussia, for damages of an alleged detention of the ship Essex by the military authorities of the United States at New Orleans, in the month of September, eighteen hundred and sixty two, be, and is hereby, referred to the Court of Claims for its decision in accordance with law, and to award such damages as may be just in the premises, if he may be found entitled to any damages."

On the 19th day of June, 1862, the said ship sailed from the port of Liverpool, England, for the port of New Orleans, Louisiana, where she arrived on the 24th of August, 1862; at which time, and while said ship remained in said port, the city of New Orleans and its port were in possession of the military forces of the United States engaged in the suppression of the rebellion, and Major-General B. F. Butler was in command of said military forces. The said city was practically in a state of siege by land, but open by sea, and was held by those forces under martial law.

The commanding general was expressly enjoined by the Government to take measures that no supplies went out of New Orleans which could afford aid to the rebels. In pursuance of that injunction, and acting upon his responsibility as commander, he issued orders in regard to any exportation from New Orleans of any money, goods, or property, on account of any person known to be friendly to the rebel confederacy, and directed the custom-house officers to inform him when anything was sought to be sent out which might be the subject of investigation in that behalf.

In the early part of September, 1862, the said commanding general was informed that a large quantity of clothing had been bought in Belgium for and on the account of the rebel confederacy, and was lying at Matamoras awaiting delivery, because the confederate government had failed to get the means they expected from New Orleans to pay for it; and that another shipment, amounting to half a million more, was delayed in Belgium from coming forward because of the non-payment of the first shipment. And the said commanding general was also informed that it was expected the first payment would go forward through the agency of some foreign consuls; which information afterwards proved to be correct.

Early in said September the said commanding general was informed that the said ship Essex was loading for some foreign port; and he was informed by the custom-house officers that large quantities of silver-plate and bullion were being shipped on her, and that they were contained in certain cases; whereupon he gave direction that said articles should be detained until further orders from him, and not be allowed to be exported, because the men who claimed to own the goods were known to him, from information he had received, to be men not well disposed to the Government of the United States. Under orders which said commanding general had issued, that all friends of the Government should register, and all enemies of the Government should register themselves as such, one of the parties who shipped articles of said description on said ship enrolled himself as an enemy of the United States;

and all of those parties had declined to register themselves as friends of the Government.

On the 15th of September the loading of the outward-bound cargo of said ship was completed, when the master thereof applied to the collector of the port for clearance, which, in consequence of the orders of the commanding general, was refused, without any reasons for the refusal being then assigned by the collector.

The next day the said master represented said refusal to the acting Prussian consul at New Orleans, who on that day addressed a written communication to the said collector, requesting him to state what the difficulty was, so that he might take some steps to remove it. This communication was, on the same day, taken by the master to the collector, when the collector answered verbally that the ship would not be cleared unless certain freight which she had on board were taken out of her, which freight the said master, in a protest made by him and the supercargo of the ship on the 22d of said September, in enumerating the outward-bound cargo of the ship, designated as Nos. 10, 11, 12, 13, and 14, and which were set forth in said protest in full, as follows:

"10. Shipped by Robert Clark, silver-ware, one package, valued at $3,000, and one valued at $500, consigned to Geo. Green & Sons, Liverpool.

"11. Shipped by Hoghton, Rankin & Co., three cases containing family plated ware and silver-plate in use, valued at $8,000, consigned to Rankin, Gilmour & Co., Liverpool.

"12. Shipped by T. B. Ehlers, two boxes old silver-ware, valued at $6,000, sealed and consigned to Messrs. A. Duranty & Co., Liverpool, as British property.

"13. Shipped by Francis Olroyd, two boxes containing bullion, valued at $4,305, consigned to James Harris, Sun Life-Insurance office, London, care Bahr, Behrend & Co., Liverpool.

"14. Shipped by Cramer & Co., as Hamburg property, one box, said to contain, in gold, $4,745.50; in silver, $520, consigned to order."

On the 19th of said September General Butler informed the acting Prussian consul, by letter, that the ship would be dispatched as soon as she landed certain parts of her freight, of which a list would be furnished in the course of the day.

On the 20th of said September the collector of customs informed said consul that the commanding general would not permit the ship to leave port with certain cases on board, designated in his order, and that consequently the collector was compelled to refuse a clearance.

10 At the time the said answer was given by the collector to the master of said ship, that is, on the 16th of September, the collector referred the master for further explanations to Major-General Butler, commanding.

On the 17th and 18th of September the said master again applied to the collector for a clearance, but did not obtain it, and also made several attempts to see Major-General Butler, but did not get any audience or reply, except being informed by one of General Butler's aids that unless the said goods, which the aid said were contraband of war, were removed out of said ship, clearance would not be given her.

On the 19th of September the acting Prussian consul at New Orleans, at the request of said master, addressed a letter to General Butler, referring to the situation of affairs in regard to the ship, and requesting that the ship should be allowed to obtain her clearance without further delay, or that he, the consul, should be informed of the cause of the difficulty, so that he might take steps to aid in removing it if possible.

On the 20th of September the answer of General Butler to said consul's letter was delivered to the consul in the terms following:

"HEADQUARTER'S DEPARTMENT OF THE GULF,
New Orleans, September 19, 1862.

"SIR: Your note in relation to the ship Essex was received by me this evening. I regret that the necessary press of pre-engaged business, a part of which was an endeavor to speed the Essex, prevented my seeing you.

"It is perhaps not the fault but the misfortune of the Essex that contraband articles have found their way on board her. She has been necessarily detained while these are sifted out.

"I shall be able to dispatch her soon, as she has landed certain parts of her freight which I will designate.

"I do not think that the master of the ship has intended any wrong.

"He will get the list of goods to be landed in the course of the day.

"Respectfully, your obedient servant,

"BENJ. F. BUTLER,
"*Major General Commanding.*

"The PRUSSIAN CONSUL."

On the same day an officer from the custom-house went on board the ship with an order signed by the deputy-collector of customs of the port, requiring the captain of the ship to deliver to a United States inspector, therein named, the above-described packages; whereupon the said captain refused to deliver up the same unless the bills of lading which he had given for the same were simultaneously given up to him by the parties who had shipped the packages.

After making the aforesaid protest, either the captain or the supercargo of the ship went, on the 22d, 23d, 24th, 25th, 26th, and 27th days of September, to the collector of customs, and requested a clearance for the ship, which was, at each of said times, refused, unless the above-described shipments were first taken out of the ship; which the captain and supercargo refused to do unless the bills of lading which had been signed therefor were at the same time returned to them.

On the 23d of September the Prussian consul addressed to Major-General Butler the following letter:

"CONSULATE OF PRUSSIA,
"*New Orleans, September* 23, 1862.

"GENERAL: Captain Klatt, of the Prussian ship Essex, handed to me yesterday the order issued under your authority by the col-
11 lector of this port, asking for the delivery of certain specified packages laden on board of his vessel, and informed me at the same time he refused compliance.

"You are no doubt aware that the bills of lading for the packages in question, signed respectively on the 9th and 15th instant, are in possession of the shippers, and in order to hold the vessel harmless and to avoid complication in Liverpool, her port of destination, it will be necessary that the bills of lading be returned to the captain on delivery here of the packages, or that the same be taken from his vessel by force.

"In your note addressed to me on the 19th instant, receipt of which I have the honor to acknowledge herewith, the said packages are declared to be contraband; and in this connection I would beg leave to observe that by the sixth section of the confiscation act they would only become such after the 23d, or perhaps have become such after the

18th, by the operation of your General Order No. 73; it existed, therefore, on the 15th, no cause for the detention of the Essex.

"I have now herewith the honor to hand you the protest entered by Captain Klatt against the detention of his vessel, and of which I shall also forward a copy to the Prussian minister, Washington.

"The Essex is at a great daily expense; she claims damages to the extent of $500 in gold per diem, and it is therefore of importance to bring this question to an issue either in one way or another; and begging that you will give it your early consideration,

"I remain, general, very respectfully, your obedient servant,

"J. KRUTTSCHNITT,
"*Acting Consul for Prussia.*

"Major-General B. F. BUTLER,
"*Commanding Department of the Gulf, New Orleans.*

"P. S.—Captain Klatt requests me to state that he wishes it to be distinctly understood that the non-compliance on his part with your order should only be attributed to his desire to guard himself against difficulties in Liverpool, and to no other motive.

"J. KRUTTSCHNITT,
"*Acting Consul.*"

To which letter General Butler sent the following answer:

"HEADQUARTERS DEPARTMENT OF THE GULF,
"*New Orleans, September* 23, 1862.

"SIR: I have received yours of the 23d, containing protest.

"The ship Essex has been at liberty to depart since the date of the collector's letter to you. If the captain choose to lie here any longer, he does it at his own risk and expense.

"I suppose it is within the province of a military commander to determine for himself, and upon his own responsibility, what he may judge the necessity of his position will allow to be shipped from the post under his command. I have exercised that discretion, and I do not require any interpretation of my orders from the acting Prussian consul to govern my action.

"I take leave to call your attention that the only Prussian consul accredited here is in command of rebel forces in the field, while his wife remains in this jurisdiction.

"While I have endeavored, and shall still endeavor, to interfere as little as possible with any acts either of commerce of your countrymen or official acts of yourself, as I have endeavored to extend to you every courtesy, I am not a little surprised at your action in regard to ship
12 Essex. I shall not use force to take the obnoxious packages out of the Essex, because I believe that very force would be made a subject of complaint; but I repeat what I have already said, until the master of the Essex deliver those packages to the custom-house officer the ship cannot sail, and if he remains, as he is now doing, it must be at his own risk and peril.

"I have the honor to be, your obedient servant,

"BENJ. F. BUTLER,
"*Major-General Commanding.*

"The ACTING PRUSSIAN CONSUL, *New Orleans.*"

Previously the acting Prussian consul had addressed to General Butler the following letter:

"PRUSSIAN CONSULATE,
"*New Orleans, June* 19, 1862.

"GENERAL: Some remarks contained in certain official documents published in last evening's Delta induce me to take the liberty to inform you that the Prussian consul to whom you allude has handed in his resignation about a year ago, viz, on the 27th May, 1861. Since then I am acting as consul under the sanction of the Prussian minister at Washington, and another appointment will probably soon be made under royal exequatur.

"I remain, general, very respectfully, your obedient servant,
"J. KRUTTSCHNITT,
"*Acting Prussian Consul.*

"Major-General B. F. BUTLER,
"*Commanding Department of the Gulf, New Orleans.*"

On the 29th of said September a custom-house officer presented on board the ship all the bills of lading which had been signed and given to T. B. Ehlers for his shipment as described above as No. 12, and demanded that the two cases constituting that shipment should be given up to him, which was done; the captain reserving, under protest, the ship's rights relative thereto.

The next day the collector was again applied to for a clearance, which he again refused unless the other shipments, described above as Nos. 10, 11, 13, and 14, were taken out of the ship; which the captain refused to do unless the bills of lading signed for the same were at the same time returned. Similar demand was made for clearance, with the same result, on the 1st, 2d, 3d, and 4th days of the ensuing October.

On the said 4th of October a custom-house officer, accompanied by a sergeant and two soldiers of the United States Army, went on board the ship, and presented a letter from Robert Clark, the shipper of the lot above described as No. 10, asking the captain to deliver the two cases constituting said shipment to said custom-house officer; but the bills of lading which had been given for said cases were not produced, and thereupon the captain refused to give up said cases unless the said bills of lading were at the same time given to him. Whereupon the said custom-house officer, sergeant, and soldiers demanded the keys of the hatches of the ship from the custom-house officer who was on board and in charge of the ship, and, having obtained them, opened the hatches, and the sergeant and soldiers, by force, took the cases constituting shipment No. 10 out of the ship, against the remonstrance and protest of the captain and supercago.

At half past 9 o'clock a. m. on the 6th of October, demand was again made on the collector for a clearance for the ship, which was refused unless packages No. 11, 13, and 14 were first taken out;
13 which the master again refused unless the bills of lading therefor were given up.

At 11 o'clock a. m. of that day a custom-house officer went to the ship and informed the captain that the ship would be cleared as soon as he would present himself at the custom-house, as the military authorities allowed him to clear the ship with the remaining portion of the freight on board, and the ship was cleared on that day.

The aforesaid freight was taken on board said ship under a general

permit from the custom-house to take an outward-bound cargo, and with the knowledge of the custom-house officer present on board, and no concealment in regard thereto was attempted by the officers of the ship.

All the refusals by the collector of customs to grant a clearance of said ship were made in obedience to the orders of the said commanding general.

The captain of the ship based his refusal to deliver up the shipments aforesaid upon the ground that he would by the delivery, without the exhibition of force, be liable to the shippers upon the bills of lading he had given for the goods.

The said captain asked some of said shippers of said freight to give back to them the bills of lading he had signed therefor; but they said they had sent them on to Liverpool.

The said ship, on the 16th of said September, was ready to proceed to sea, if a clearance had been granted her; and on that day she had on board sixteen passengers. When she sailed from New Orleans in October she had on board thirty-one cabin and four steerage passengers.

Before the passage of the joint resolution under which this suit was brought, the matter of this claim was the subject of diplomatic correspondence between the Governments of the United States and Prussia. And on the facts stated the court find that the petitioner is entitled to recover from the United States a reasonable compensation as an indemnity for the loss sustained by him for the detention of his ship Essex, as aforesaid, the sum of $13,595.65, as set forth in Schedule A, annexed hereto, for which judgment is rendered:

SCHEDULE A.

For detention of vessel	$10,000 00
For freight, 8 cases of silver-ware, &c	95 00
For freight of Brown	60 00
For loss of profits on 35 steerage passengers and 10 cabin passengers	1,575 00
For board of 16 cabin passengers, 20 days	960 00
For board of 19 cabin passengers, 10 days	570 00
For board of 9 steerage passengers, 20 days	180 00
For board of officers and crew, 20 days	660 00
For wages of captain, $150 per month, 20 days	100 00
For wages of first mate, at $50 per month, 20 days	33 32
For wages of second mate, at $40 per month, 20 days	26 66
For wages of 4 boys, at $9 per month, 20 days	24 00
For insurance on freight, 20 days	178 67
For insurance on ship, 20 days	188 60
For notary charges paid	100 00
Total	13,595 65

14 And the court find, as conclusion of law—

That said Eugene Deikelman is entitled to receive the said damages under the treaty existing between the United States and Prussia in September and October, 1862, and if not under said treaty, under the law of nations and the private act of Congress.

By the court.

LORING, J., delivered the opinion of the court:

The few facts in this case which the majority of the court deem material are, that the ship Essex, belonging to the petitioner, a Prussian subject, was detained at New Orleans for twenty days, by the order of General Butler, the military commandant of the city, on the alleged ground that she had on board articles contraband of war, and that by such detention of his vessel the petitioner sustained the loss stated in the finding of facts.

That New Orleans was under martial law, and in a state of siege by land, and threatened by recognized belligerents without and their more dangerous accessaries within; that General Butler's instructions enjoined upon him the strictest watchfulness, and that his position required of him prompt action, and that his information and the circumstances at the time justified the belief on which he acted; all these things, we think, are immaterial, because they in no way inculpate the petitioner or lessen the damages he has sustained, without fault on his part or on the part of his agents, the master and crew of his vessel; for it was proved, and not questioned, that the vessel was laden according to the requirements of law, under permits from the custom-house, and in the presence of a custom-house officer on board, and with all the formalities of procedure used at the port of New Orleans.

And the petitioner was in the exercise of his right. He was engaged in that foreign commerce which the President's proclamation had invited to our shores, and to which it had opened the port of New Orleans by removing its blockade, and for the due security of which it had pledged the public faith. And the petitioner was, moreover, a subject of the King of Prussia, a friendly power, with whom, from our earliest days as a nation, treaties of amity and commerce had established the measure of mutual national obligations and prescribed the modes of procedure in cases like this, that peace and good-will between the countries might not be interrupted.

The subsisting treaty between Prussia and the United States in 1862 was the treaty of 1828, (8 Stat., 384,) which revived and adopted the thirteenth article of the treaty of 1799, (8 Stat., 168;) and that article is as follows:

"ARTICLE XIII. And in the same case of one of the contracting parties being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such a length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be

admitted to do it, and the vessel shall not, in that case, be carried
16 into any port nor further detained, but shall be allowed to proceed on her voyage."

And then follows a specification of contraband articles.

The preamble of the article declares its purpose to be "to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband." Thus the purpose of the article covers all cases of the detention of vessels for contraband merchandise on board, and the language of the article conforms to its purpose, and is to be so construed as to effect it.

The purpose of this provision is the maintenance of peace and goodwill between the two countries; and for this it legitimizes and regulates between the parties the detention of vessels having on board goods contraband of war, whether such vessels are at sea or in port. And it authorizes either party to use such detention to prevent aid to his enemy and for his own protection against an apparent danger, and it necessarily makes each the judge of the instances and extent for which his safety may require the use of the right granted, and it fixes the price to be paid for its use by the government using it, and that price is the least that equity would permit, for it is merely an indemnity for the loss which the use of the right by one party for his own security may occasion to a subject of the other. On the evidence the United States have exercised the right thus purchased, and all that they are called upon to do is to pay the price; and the joint resolution of Congress sending this case here is only the means of ascertaining the fact of the detention and the amount of indemnity, if any is due.

And it is no answer to this claim to say that the articles on board the vessel were not contraband of war, and that the United States were mistaken in the ground that they alleged for making the detention. For, none the less, the United States used the right they had purchased, and therefore should pay the price stipulated for the use of the right. What they were to pay for was not the benefit the detention secured to them, but the injury it did to a Prussian subject, and that is the same whether their allegation was or was not well founded. And the fact that the vessel was detained as having on board contraband articles is equally true, and therefore the detention is equally within the treaty, whether she had such articles on board or not.

It was urged in the defense that the action of General Butler was justifiable in the circumstances in which he acted. That may be so; and our decision does not conflict with that, for it does not rest on the ground that any wrong was done either by General Butler or the United States, but only on the ground that the United States exercised a right they had purchased, and are therefore bound to pay the price stipulated for the exercise of the right. The claim for which we render judgment does not sound in tort, but arises ex contractu, for a treaty is a contract. And that the petitioner in his petition claims as for a tort is immaterial, for our judgments are to be rendered on the law and the evidence; and that a claimant mistakes either, is no reason for withholding from him that justice the law and the evidence entitle him to.

As has been said, we think this case is within the words and purpose of the thirteenth article of the treaty; that seeks to prevent "all the difficulties and misunderstandings that usually arise respecting merchandise of contraband" on shipboard. And this it could not do unless it covered all cases of such detention, for all are equally within the mischief sought to be prevented.

And the treaty is, by the Constitution, "the supreme law of the land," and

therefore all authority, legislative or executive, civil or military, is
17 to be used in subordination to it, and is to be held to have been.

And a treaty is a contract between nations, and where it concedes a right for a price, if the right is used, the price is to be paid to preserve the good faith between the high contracting parties and the peace and good-will involved in it.

And if the case were not within the treaty, still we think that under the law of nations the claim for indemnity for the petitioner would be a valid claim as between the two nations, and there would be reason enough for the action of Congress in sending the claim here.

Undoubtedly the rule in American law is that where a foreign subject comes into this country for business or travel, and he is here subjected to a wrong, he must take such remedy as our laws provide for the wrong, because by coming here he submits himself to our laws. This was decided by the Supreme Court in the case of the Exchange, (7 Cranch, 116,) in 1812, and the celebrated opinion of Chief-Justice Marshall has since been made part of the standard text-books on international law. (Wheaton, Lawrence's edition, 191, 8.) In the case cited, Chief-Justice Marshall said: "When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with that other, or where merchant-vessels enter for the purposes of trade, it would obviously be inconvenient and dangerous to society, and would subject the laws to continual infraction and the government to degradation, if such individuals did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country."

But this rule applies only to the standing laws of a country administered by its judicial tribunals, and it has no reference to martial law, which may exist in one place and not in another, and may exist to-day and not to-morrow, and depends on the will and discretion of a military officer, and has no other rule or measure. It never has been held that a foreign citizen submits himself to these, or for these abandons his right to protection from his sovereign, which is the consequence of his allegiance to his sovereign, who is bound to protect him, as he is bound to protect his flag, his public ships, his colonies, or his territories; and not only to protect him against wrong, but to assure to him indemnity against a loss to which another power subjects him for security to itself, for that rests on the same equity in which our Constitution provides that private property shall not be taken for public use without just compensation. And therefore in a case like this, if no treaty existed, the question of a loss inflicted or an indemnity due would be not between the military officer who inflicted the loss and the foreign subject who suffered it, but between the government under whose authority the officer acted and the government of the foreign subject, and under the law of nations and not under municipal law; and hence the diplomatic correspondence on this case between the two governments stated in the finding of facts. And we think it is in recognition not only of the treaty referred to, but also of the distinction between standing laws and martial law, and between individuals under the municipal law and between nations under the law of nations, that Congress has sent here this case, to which our general jurisdiction would not have extended, for us to ascertain the facts and the measure of indemnity due.

If the foreign subject had offended the laws of this country, and thereby incurred detention, or had forborne to do what he could reasonably do to avoid it, this might forfeit or qualify his right to indemnity. But nothing of the kind is shown here. On the contrary, it is shown

that the master was willing and offered to land the articles specified, on the return to him of their bills of lading; and where the bills were returned to him, he returned the goods specified in them to the shippers. As some of the bills of lading had been sent to Liverpool, they could not be delivered up to the captain, and therefore he did not return the cases those bills related to. And for this he assigned a sufficient reason, that his owner and his property would be liable to suit in Liverpool on the bills of lading. To this the captain had no right to subject his owner, to avoid the detention, because for that his owner had a certain indemnity, which the captain had no right to exchange for the uncertainty and cost of litigation; and it may well be doubted whether his surrender of the goods under the authority of General Butler would have justified him against the owners of the goods, for they might well say you had an indemnity for the detention, and as you could not come to harm by that, you had no right to buy your exemption from it by the surrender of our property intrusted to you.

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And under the law of nations, or under the treaty, it was optional with the master, in the circumstances in which he was placed, whether he would surrender the goods or suffer the detention; and his exercise of an option allowed to him for his benefit cannot be imputed to him as an offense. And, under all the circumstances of the case, and for the reasons he himself declared from the first and persistently, we think his action in the matter was but a discreet and proper performance of his duty to his owner and the owners of the goods laden on board of the vessel.

DRAKE, Ch. J., dissenting:

This case comes into this court under a joint resolution of Congress, (16 Stat. L., 664,) passed May 4, 1870, in the following words:

"That the claim of E. Diekelman, a subject of the King of Prussia, for damages for an alleged detention of the ship Essex by the military authorities of the United States at New Orleans, in the month of September, 1862, be, and is hereby, referred to the Court of Claims for its decision in accordance with law, and to award such damages as may be just in the premises, if he may be found entitled to any damages."

The majority of the court are of the opinion that it is "in accordance with law" to allow the claimant damages. I do not concur in that opinion.

On the 12th of May, 1862, the President of the United States issued a proclamation declaring that the blockade of the ports of Beaufort, Port Royal, and New Orleans should so far cease and determine, from and after the 1st day of June next ensuing, that commercial intercourse with those ports, except as to persons, things, and information contraband of war, might from that time be carried on, subject to the laws of the United States and to the limitations and in pursuance of the regulations which were prescribed by the Secretary of the Treasury in an order of the same date with said proclamation.

By the regulation referred to, every vessel clearing at a foreign port, destined to either of the ports named in that proclamation, was required to obtain a license from a consul of the United States, upon satisfactory evidence that she would "convey no person, property, or information contraband of war either to or from the said ports; * * * and on leaving either of said ports she would be required to have clearance from the collector of customs according to law, showing no violation of the condition of the license."

The claimant's ship was not detained in the port of New Orleans, by the authority of any officer of the United States, a single hour after
19 clearance was granted to her. The detention was in obtaining the clearance, which was withheld in pursuance of orders from the military commander at New Orleans, which city was in the midst of a hostile territory, practically in a state of siege by land, and held under and governed by martial law.

When the claimant's ship went into the port of New Orleans under those circumstances, she went there with no greater rights than any American vessel would have had under like circumstances. She went there subject to the same law that governed the ships of American citizens, and that was martial law. Municipal law was silent, except as martial law permitted it to be administered. Martial law was, then and there, to citizens and foreigners, to American ships and foreign ships, as much a part of "the laws of the United States" as any act of Congress; or, if not, then acts of Congress could be enforced only so far as the paramount military authority deemed it consistent with the public safety to allow them to be enforced. So, however regarded, the law that reigned supreme over the captured rebel city, and without which there would have been nought but anarchy and confusion, was martial law, superior to statutes and treaties, and as indispensable to the public safety as gravitation to the order of the universe. No man, native or alien, no ship, domestic or foreign, could enter that city or its port and claim exemption from the power of martial law, or the right afterward to reverse, in a civil court, the decrees of the military commander whose will enforced it. Martial law there was the nation's dread necessity, which no man, whether of American, European, or any other nationality, had any right to question, either by resistance at the time or by subsequently demanding of the nation damages for its operation upon himself in common with all who were there. If the claimant saw fit to send his ship there, he took the responsibility of her coming under the power of whatever law was in force there, especially the law which bound all for the safety of all. Implicit obedience was, for each and all who went there, the only guaranty of freedom from damage.

The captain of the claimant's ship saw fit to set up his will against that of the commanding general who held the city, and he thereby suffered detention, for which the claimant demands damages. I hold him entitled to none. If men, for the sake of gain, will go into fire, they must expect to be scorched, whether they be Prussians or Americans; if they will sail into a beleagured port, where the presence of treason on every hand makes martial law the only hope of loyalty and order, they sail into the grasp of martial law, and if martial law grips them so hard as to leave the prints of its fingers, that is their lookout, and they have no claim for indemnity on the power through whose comity they are permitted there at all.

The claimant's ship came into the port of New Orleans with the express notice contained in the order of the Secretary of the Treasury, that she could not go out of that port unless she had "clearance from the collector of customs according to law, showing no violation of the condition of the license." When, therefore, the master of the ship applied for clearance, it was incumbent on him, as a condition precedent, to show the collector that there was nothing in the ship the taking of which from that port would be such a violation; that is, he was not entitled to clearance until he satisfied the collector that his ship had not on board any "person, property, or information contraband of war." If he applied

for clearance without showing that, the absence of that showing was an all-sufficient reason for the collector's refusing the clearance. Much more was the fact, that was known to the military authorities, that there had been taken on board property which the commanding general held to be contraband of war. Whether it was in fact contrabard of war according to public law was not the question. The claimant voluntarily sent his ship into the port of a nation which was in the midst of a war, of vast proportions, for the suppression of a rebellion of vaster proportions than the world probably ever before saw. He sent her there knowing the conditions upon which she could obtain clearance therefrom; and knowing, too, that martial law was there to enforce those conditions. It was the duty of the master of the ship to clear his own way out, by knowing that he took nothing on board which the general commanding could have reason to believe would, at the port to which the ship would go, give aid or comfort to the rebellion. What would give such aid or comfort was not for the master but for the military commander to determine. If the master assumed his right to determine that question, he assumed the whole responsibility of his decision coming in conflict with the will of that commander, and of all the consequences. And when clearance was refused him because of what he had taken on board, it was his duty to have immediately put the things off the ship. That he had signed bills of lading for them was no justification of his refusal to put them off. It was his business, before he signed the bills of lading, to know that he was not thereby to be brought in conflict with the military authority, which was supreme there. That there was a custom-house officer on the ship when the parcels were brought on board did not dispense with the obligation on the master of the ship to see that he did not cross the will of that authority. And so it turns out that, by neglecting these obvious precautions against complications, he involved himself in the detention complained of. And when he found himself so involved, instead of seeking the shortest way out of the difficulty, he planted himself in opposition to the military commander, evidently trusting to his Prussian nationality as a protection against the prompt and summary application of martial law, which would have visited any American citizen who would have ventured upon such an experiment. I deny that he was entitled to any more favor than an American citizen would have been under the circumstances.

It is, in my opinion, quite vain to appeal to treaty provisions between Prussia and the United States as a foundation of an award of damages in this case against the latter, for the simple reason that nothing is to be found there applicable to such a case this; that is, nothing is to be found there which applies to the case of one of the nations being engaged in the suppression of a rebellion, and a ship of the other going into a port there which is under martial law. The only treaty provision between this country and Prussia which is supposed to bear upon this case is Article XIII of the treaty of 1799, which was continued in force by the treaty of 1828, and is in the following words:

"ARTICLE XIII. And in the same case of one of the contracting parties being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such a length of time as the

captors may think necessary, to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reason-
21 able compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port nor further detained, but shall be allowed to proceed on her voyage."

I do not propose to enter upon any extended discussion of this article, but consider it sufficient to state the reasons why I hold it to have no place here. They are as follows: 1. Because, manifestly, it was intended only for the case of a war between one of the contracting parties and some other power, and not to a case of intestine war, in which one or the other party might be involved. 2. Because it applies only to cases of the arrest of vessels on the high seas, in the progress of their voyage, and not to that of vessels entering a port which, because of such intestine war, is under martial law. And, 3 Because, if the treaty does apply to the subject-matter of the injury done to the claimant, it does not confer on him the right to sue the United States for reparation for that injury. Beyond doubt a treaty is a contract, and either party to it may demand reparation from the other for any breach of it; but that right does not extend to the individual citizens or subjects of either country, for they are not parties to the treaty. If they have rights under the treaty, those rights must be asserted by the sovereignty which was a party to the contract, not by them.

But if these reasons be not valid, this court, in my opinion, has no jurisdiction of this claim, as a claim growing out of or dependent upon the treaty in question; but, on the contrary, is expressly denied such jurisdiction by section 9 of the act of March 3, 1863, (12 Stat. L., 765, h. 92,) which is in the following words:

"That the jurisdiction of the said court shall not extend to or include any claim against the Government not pending in said court on the first day of December, anno Domini eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.'

Clearly, if the claimant had not been authorized by special resolution of Congress to sue in this court, it would not for a moment be questioned that this provision applied to his case, completely barring the prosecution here by him of "any claim * * * growing out of or dependent on any treaty stipulation entered into" between Prussia and the United States. The only way in which this bar can be avoided is by showing its removal by subsequent legislation. And the only subsequent legislation which can be looked to for that purpose is the joint resolution authorizing the claimant to sue here. If the effect of that resolution is to repeal, pro hac vice, the ninth section of the act of March 3, 1863, then the case should be considered in the light and under the obligation of the treaty stipulation; but if such is not the effect of that resolution, then, in my judgment, we must consider the case wholly aside from and independent of that stipulation. In my opinion the ninth section is not only unrepealed, but entirely unaffected, by the joint resolution.

In construing that resolution, it will be remembered that this court has

uniformly insisted on the strict construction of private acts of Congress. (Hubbell vs. United States, 6 Ct. Cls. R., 53; Roberts vs. United
22 States, ibid., 84.) In the former of those cases the very point was raised which is presented in connection with this resolution, viz, the effect of a private act of Congress as a repeal of a general law. There the court said: "Repeals by implication are not favored in law, particularly the repeal of a general statute by a private one. The latter is to be strictly construed when opposed to the former; and the purpose of the legislature to embody in a private act a repeal, suspension, or change of a public law must clearly appear."

Applying these views here, we not only do not find expressed in the joint resolution any purpose to set aside the ninth section aforesaid in favor of this claimant, but to me it is plain that the intention was to submit the case to this court under and subject to the general law then in force. When the claim is referred to this court "for its decision in accordance with the law," and the law then in force denied to this court jurisdiction of "any claim growing out of or dependent on any treaty stipulation," it is clear to my mind that Congress intended to refer to us a claim which did not grow out of or depend upon a treaty stipulation; in other words, that the claim was to be made out here without the aid of treaty stipulations. Otherwise the general law is, by implication, overthrown by a private act, which nowhere expresses the purpose to effect such a result. If it had been the intention of Congress to suspend the operation of the ninth section in question in favor of this claimant, the short and simple way to do it was to say so in so many words, as was done in the "Act for the relief of Alexander J. Atocha," passed February 14, 1865, (13 Stat. L., 595, ch. 36,) where express authority was given to consider a claim which grew out of and was dependent on treaty stipulations. In the absence of plain expressions of an intent to suspend the ninth section aforesaid in favor of this claimant, I hold no such intent to have existed, and that the prohibition of jurisdiction contained in that section is applicable to this case, so far as the claim may be supposed to grow out of or be dependent on treaty stipulations.

In no view can I see that it is "in accordance with law" to condemn the United States in damages because the captain of the claimant's ship chose to run a tilt against General Butler at New Orleans, and thereby suffered a detention which it was his duty to have avoided beforehand, or, as soon as he found himself involved in it, to have relieved himself from by instant obedience to a will which was stronger than his—which was, of necessity, the ruling will of all in that city, and which was backed by a force he could not resist. The United States pays no damages to its own citizens in such cases, and I cannot see why it should pay them to the citizen or subject of another country. Were the circumstances of the two countries reversed, and an American should, in just such a case, sue Prussia, it would be admonitory and impressive to behold the Teutonic emphasis with which the demand would be scouted from Prussian territory.

23 In the Court of Claims.

EUGENE DIEKELMAN
vs.
THE UNITED STATES. } No. 6176.

I, John Randolph, assistant clerk of the Court of Claims, do hereby

certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the Attorney General, for the defendants, for the allowance of an appeal, as filed in the clerk's office December 13, 1873, and of the order of the court of April 6, 1874, allowing the same, of the findings of fact and conclusion of law thereon upon which the court founded its judgment, of the opinion of the court, and of the dissenting opinion of the chief-justice.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this eleventh day of May, A. D. 1874.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsment on cover:) Court of Claims, No. 176. The United States, appellants, vs. Eugene Diekelman. Filed 14 May, 1874.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

THE UNITED STATES, APPELLANTS,
vs.
EUGENE DIEKELMAN. } No. 176.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

THE UNITED STATES, APPELLANTS,
vs.
EUGENE DIEKELMAN. } No. 176.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

STATEMENT OF THE CASE.

The Court of Claims only obtained jurisdiction of this cause by a joint resolution passed by Congress May 4, 1870, which (omitting the title and enacting clause) was of this purport: "That the claim of E. Diekelman, a subject of the King of Prussia, for damages for an *alleged* detention of the ship Essex *by the military authorities* of the United States at New Orleans, in the month of September, 1862, be, and hereby is, referred to the Court of Claims for its decision *in accordance with law*, and to award such damages as may be *just* in the premises, if he may be found entitled to any damages."

After the President's proclamation of May 12, 1862, (12 Stats. at Large, 1263–'4,) to wit, August 24, 1862, the Essex

arrived at New Orleans, which city was then and thereafterwards till after the 6th day of October, 1862, in a state of siege by land, though open by sea, and was held by the United States forces under General Butler, *under martial law*. The commanding general had been expressly directed by the Government to take measures that no supplies went out of New Orleans which could afford aid to the rebels. Accordingly, he issued orders in regard to the exportation from New Orleans of money or goods on account of any person known to be friendly to the rebel confederacy, and instructed the customs officers to inform him when any attempt was made to take out anything of this kind which required investigation. Early in September, 1862, General Butler learned that a large quantity of clothing, purchased in Belgium for and on account of the confederacy, was lying at Matamoras awaiting delivery on account of the failure to obtain from New Orleans the expected funds to pay for it; that another shipment, worth $500,000, was withheld in Belgium on account of this failure to pay for the first shipment; and that it was expected that the first payment would go forward through the agency of some foreign consuls; which information afterward proved to be correct. At the same time General Butler also ascertained that the Essex was loading for a foreign port; that quantities of bullion and silver plate were on board belonging to men all of whom had refused to register themselves as friends of the United States, and one of whom had registered as its enemy, under an order of the military commander directing all persons to register one way or the other. The ship completed her lading and was ready for sea September 15, 1862, on which day the master applied for a clearance,

which was refused, and upon the following day the master was told by the collector that the ship would not be cleared until the bullion and silver ware specified were unladed. This the ship's captain refused to do without a return to him of the bills of lading, and vainly applied from day to day for a clearance, alleging as his reason for refusal to re-land the bullion the liability of his owners upon the bills of lading he had signed for the goods, which bills were in the hands of the shippers, to whom the captain also applied for them, and was told by some of them that their bills had been sent forward to Liverpool. One shipper surrendered his bill of lading to a custom-house officer, who presented it to the ship's captain and demanded the goods therein specified, which were delivered to him under protest, made to preserve the ship's rights. A customs officer subsequently went on board in company with a sergeant and two soldiers with a letter to the captain from another shipper directing the delivery to the officer of his shipment. The captain refused compliance without return of the bills of lading, and the hatches were opened by the boarding-party, who obtained the keys from the customs officer in charge of the vessel, and the goods named in the letter were removed against the captain's protest.

Upon the morning of October 6, 1862, demand was again made by the master of the Essex upon the collector for a clearance, which was refused without the other packages of bullion and plate were removed; but at 11 o'clock of that day the captain was told by a customs officer sent with the message that his ship would be cleared so soon as he would present himself at the custom-house, as the military authorities would allow her

departure with these articles on board, and she was accordingly cleared upon that day. This freight was laden on board with the knowledge of the customs officer present on board of the ship, and without any concealment upon the part of the captain, under a general permit to take in an outward-bound cargo. The collector's refusal to grant a clearance was in obedience to the orders of the military commander.

The Court of Claims gave judgment in favor of the petitioner for $13,595.65.

ERRORS ASSIGNED.

Upon the facts found by the Court of Claims, its judgment should have been that the petition be dismissed, instead of in favor of the claimant.

That court erred in holding the United States liable for the aforesaid acts of its military commander, commanding a district then held under martial law.

That the court erred in holding there was any such "detention" of the ship Essex "by the military authorities" of the United States as to give her owner any legal and just claim for compensation.

That the court erred in finding that any detention, occurring in the manner hereinbefore stated, was "by the military authorities" of the United States, in any such sense as to afford the basis of a claim against the United States and to bring the case within the purview of the statute referring the same to the Court of Claims.

ARGUMENT.

Assuming, of course, that the claim will be supported here upon the same grounds taken successfully in the court below, (see 8 Court of Claims Reps., 375–384,) it

appears that, although the petition sounds in tort, the claim was presented and allowed as arising *ex contractu*.

The Government denies the existence of any claim, in tort or contract. What was actually done was to withhold and refuse a clearance for twenty days, from September 15 to October 6, 1862.

The supposed contract is based upon the terms of the then-existing treaty between Prussia and this country, and of the President's proclamation of May 12, 1862, opening New Orleans and other ports to trade, under the limitations therein expressed, and implied from existing circumstances.

The portion of the treaty thought by the claimant to be applicable is this:

"ARTICLE XIII. And in the same case of one of the contracting parties being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband *so as to induce confiscation or condemnation and a loss of property to individuals.* Nevertheless, it shall be lawful to stop such vessels and articles, and detain them for such a length of time as the *captors* may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the *captors* the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the cur-

rent price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not, in that case, be *carried into any port*, nor further detained, but shall be allowed *to proceed on her voyage.*"

Then follows a specification of contraband articles.

I.

"A treaty is a *compact*"—not a *contract; i. e.*, it cannot be enforced in *invito*—" between independent nations." (2 Bouvier's Law Dict., 599; 2 Burrill's Law Dict., 996.)

It is an act of sovereignty, not a *mere* agreement. Though entered into by the sovereign as such, for the benefit of the whole nation, as an entirety, individuals may have to suffer by it. (The Peggy, 1 Cranch, 103; Ware *v.* Hylton, 3 Dallas, 236, 245.) Consequently, the principle that where A makes a promise to B for the benefit of C, the latter may sue, has no application to treaty stipulations. Treaties are *sui generis*. Claims arising under them are, so far as the respective nationalities are concerned, diplomatic claims. Even though the owner of the Essex might have maintained a common-law action against the collector of New Orleans, if the vessel was wrongly detained, (Bas *v.* Steele, 3 Wash. C. C. 395,) yet, as to the United States, it was a diplomatic claim, to be adjusted only by the intervention of the Prussian government. In no sense is an individual citizen party to a treaty any more than to a statute, though restrained in his actions and rights by the provisions of both. Courtesy toward the opinion of

the Court of Claims to the contrary required that this much should be said; but more upon this point seems unnecessary, except to add that though treaties may affect litigants, they are not to be considered as giving the right to litigate.

Even if a treaty were a contract under which a right of litigation against one of the contracting nations in behalf of a citizen of the other might arise, the article of this treaty which is before quoted is not fairly susceptible of the construction put upon it by Mr. Diekelman. Treating it as a contract, it is governed by the ordinary principles of interpretation applicable to them, (Smoot's case, 15 Wallace, 36;) the first and chiefest of which is to ascertain the intention of the parties in using the language employed. (Gardner's Inst., 569; Lawrence *v.* Allen, 7 Howard, 793; United States *v.* Hodsdon, 10 Wallace, 395; Catlin *v.* Hall, 21 Vermont, 157.) This is to be learned most satisfactorily by examining surrounding and attendant circumstances to determine definitely the subject-matter to which it relates, and the topic which must have attracted the especial attention of the contracting parties. (United States *v.* Percheman, 7 Peters, 86–88; Lattimer *v.* Poteet, 14 Peters, 4, 11; Society *v.* New Haven, 8 Wheaton, 490.)

It is a memorable part of the world's history that when the United States first assumed position as a nation, and for a generation and more thereafter, the question which agitated every maritime community was the right of free navigation of the seas, and especially the assertion of and resistance to Great Britain's claim of right to visit and search neutral vessels upon

the high seas and in the prosecution of a voyage, as well in peace as in war. To England's claim almost every European nation, as well as the United States, offered remonstrance or resistance. (Lawrence on Visitation and Search, 1, 2, *et seq.*)

This country adhered to and promulgated the doctrine that "free ships make free goods," incorporating it into treaties when able to do so; as in the case of the treaty of 1785 with Prussia. (Wheaton's Elements of International Law, sixth edition by Lawrence, 517–530.) This article was not retained in the treaty of 1799 nor of 1828, (8 Stats. at Large, 168,) but was modified as there appears.

A perusal of this article, even taken by itself, and disregarding all history of the conflicts and discussions during which it was adopted, shows that it was only intended to apply to the case of war between either of the contracting nations and some foreign power; and then only to vessels in the actual navigation of the high seas beyond the municipal jurisdiction of either sovereignty. It was to avoid "all the difficulties that *usually* arise respecting merchandise of contraband" that this article was inserted. What were those difficulties? Why, that neutral ships were taken as prize upon the high seas and sent in for adjudication. This article says the carriage of such goods shall not "induce confiscation or condemnation." But it says "the *captors*" may detain, take, and use the goods upon payment therefor. This language is employed of vessels and cargoes *in transitu;* therefore the word "captors" must be given its technical meaning—those who make prize of a vessel at sea. But for the treaty, a vessel found at sea with contraband goods on board could have been sent in for

libel and condemnation as prize of war; this article limited the right, but still treats the seizing party as captors; and it concludes that if the master will deliver out the contraband goods, the vessel "*shall not be carried into any port*," "*but shall be allowed to proceed on her voyage;*" in the clearest terms evidencing that it was the case only of vessels stopped and searched upon the high seas that was intended to be included within this article of the treaty. (Wheaton's Right of Search, 134, 135; De Burgh's Mar. Int. Law, 7, § 5.)

II.

What bearing has the President's proclamation of May 12, 1862, upon this case? The circumstances attending its issue, as well as its words, must be considered. New Orleans was declared under blockade April 19, 1861. The proclamation of May 12, 1862, declared a determination of the blockade except as to certain articles and information, and that trade was to be carried on under certain limitations and regulations. It was prescribed that each vessel should, before departing from the port, "have a clearance from the collector of customs according to law, showing no violations of the conditions of her license," under the penalty of forfeiture and condemnation. It was then well known, and is found as a fact in the case, that the city of New Orleans was "in a state of siege by land," and that it was held by the military forces "*under martial law.*" It was to such a port, so situated, where such law necessarily dominated, that the claimant was invited, if invitation it can be called. It is more correct to say that he was *permitted* to come and trade there, provided he desired to do so under the circumstances indicated, and accept-

ing the dangers and responsibilities necessarily involved in the enterprise.

Whenever a vessel comes into an American port she subjects herself and her crew, temporarily, to the regulations of the municipal law there in force.

If, during war, she enters a besieged place, where the law prevailing is martial law, by parity of reasoning, she subjects herself *pro hac vice* to that law, which is for the time being the law of the land there. The necessities of martial law are such that this cannot be otherwise. (Halleck's Int. Law, 372; Clode's Mil. & Mart. Law, 162, *et seq.*)

"The basis of martial law is *danger*." (Finlason's Martial Law, 64.) And the measures it requires and justifies are to avert *danger*, rather than to detect offenses or punish guilt. It makes the safety of the people not only the supreme but the sole law of the time and place where it exists; and what that safety requires is for the military commander to determine.

It was in the course of the administration of this law—then and there a part of "the laws of the United States," according to which alone trade was permitted—and not by virtue of any treaty stipulations, that the Essex was detained. It would be as proper to search the civil code of Louisiana, or the statutes of the United States, to find authority for the hanging of Mumford by General Butler, as to refer to this treaty as the basis of his right to detain and search the Essex. If this proposition needed enforcement, I could not put it so clearly and forcibly by any language at my command as it is expressed by Drake, C. J., in his dissenting opinion, upon page 14 of this record, to which I refer.

III.

If the attempt to sustain this claim *ex contractu* fails, as we think it certainly does, there is no basis for it as a tort.

A false and illegal detention of the ship, cargo, crew, and passengers would be a tort; but if they were detained legally, however injurious to their interests, it is *damnum absque injuria.* The petitioner deemed the detention tortious; but all the members of the Court of Claims agree in this, that no "wrong was done either by General Butler or the United States." (Record, 11, second paragraph from the bottom.)

If the necessities of martial law, to which she was then and there subject, required the detention of the ship, the same exigency which authorized this exercise of power prevented it from being a wrong for which damages were recoverable.

IV.

The "alleged detention" was not "by the military authorities." True, the collector refused a clearance at General Butler's direction, but no military force was used, and the purpose to use it was disavowed. (Record 7, folio 12.)

In the language of Washington, J., "The collector had two conflicting duties imposed upon him; one to the individual who asked a clearance; the other to his country. If the destination [or lading] of the vessel was the enemy, he had a right to refuse a clearance; if not, and *there were not circumstances to warrant his suspicions*, he had no such right. He was to judge upon circumstances," &c. (Bas *v.* Steele, 3 Wash. C. C., 395.) If the collector would not be liable for refusing the

clearance, did he make the country, whose agent he was, responsible in damages? If this was a *tort*, is the active party to it exonerated from any adverse claim and the passive principal liable? We think it clear that "according to law"—which is the test to be applied to this claim—if General Butler and the collector are not liable, the United States are not; and we can conceive of nothing clearer than that these gentlemen did not make themselves liable to damages.

The act of May 20, 1862, c. 81, (12 Stats. at Large, 404–'5,) requires the collector to take security that no goods laden on board any vessel shall be used to give aid to the insurgents; and its whole provisions indicate that it was not unrestricted trade to which these ports were opened, but only such as our situation would admit of being carried on.

V.

The claimant's captain and servant was responsible for the detention; as General Butler informed the Prussian consul, (Record, 7,) Captain Klatt should have given up the bullion and plate, and would not have incurred any liability to the shippers. (Bliven *v.* Hudson River R. R. Co., 35 Barb., 191.) Only the shippers could sue upon the bills of lading, and there would have been a complete defense as to them. (Thompson *v.* Dominy, 14 M. & W., 407; Dows *v.* Cobb, 12 Barb., 316.)

VI.

The private resolution under which this suit was brought did not undertake to give anything to Mr. Diekelman—to create any claim. It only authorized the Court of Claims to hear him, notwithstanding he

was an alien, and to decree according to existing law; according to the law affecting its general jurisdiction as well as according to the general principles of law.

If found to have a claim arising under a treaty, and none other, the cause should have been dismissed for want of jurisdiction. (Act of March 3, 1863, c. 92, § 9, 12 Stats. at Large, 765.) That public act cannot be considered as repealed, even *pro hac vice*, by this private resolution; but the claim is submitted in subordination to this general law. But if it could be held that the private resolution did, as to this case, repeal the statute of 1863, or suspend its operation, though not mentioned in it, then, by parity of reasoning, the re-enactment of this statute in the revision would take away the jurisdiction as to a treaty claim. (R. S., § 1066.) Inasmuch as this section is simply to limit the power of an inferior statute court, it is of no consequence that its effect is to operate as a discontinuance of a pending case. Such statutes, having this effect, are frequently passed. (Ex parte McCardle, 7 Wallace, 506; Ins. Co. *v.* Ritchie, 5 Wallace, 544; Norris *v.* Crocker, 13 Howard, 429; Webster *v.* Co. Commrs., 63 Maine, 27; Washburn *v.* Franklin, 35 Barb., 599; Bailey *v.* Mason, 4 Minn., 546; Dunwell *v.* Bidwell, 8 Minn., 34; State *v.* Daley, 29 Conn., 272; Genkinger *v.* State, 32 Penn. St., 99.

EDWIN B. SMITH,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

THE UNITED STATES, APPELLANTS,

vs.

EUGENE DICKELMAN.

No. 176.

BRIEF FOR APPELLEE.

A Prussian ship, the Essex, loading at New Orleans for Liverpool, in September, 1862, had taken on board five certain boxes of silverware, consigned to certain persons at Liverpool; and this openly, without any concealment, and with the knowledge of a custom house officer stationed on the vessel. The loading being complete, the master of the vessel applied for a clearance, which was refused by order of General Butler, commanding the United States forces at New Orleans, except upon condition that the master would first deliver up the five packages of silverware. The master offered to deliver them up if the bills of lading which he had signed were returned to him, and not otherwise, but he stated at the same time that he would oppose no resistance to their being taken by force. General Butler refused to use force, "because," as he said, "I believe that very force would be made a subject of complaint." Finally, the bill of lading for one package was produced, and the master delivered it; a second package was taken with an exhibition of force and by order of the

shipper, and the ship was allowed to sail with the other three after a detention of twenty days.

This occurrence gave rise to a diplomatic correspondence between the Governments of the United States and Prussia, subsequent to which Congress passed an act referring the claim of the owner of the Essex for damages for an alleged detention of that vessel by the military authorities of the United States, to the Court of Claims, "for its decision, according to law, and to award such damages as may be just in the premises, if he be found entitled to any damages."

The Court of Claims found that the claimant was entitled to damages to the amount of $13,595.65 and gave him judgment for that amount.

The United States appealed.

The Court of Claims rested its judgment on two grounds:

1. That the case came within the 13th article of the treaty of 1828 with Prussia; and—

2. That the claimant was equally entitled under the law of nations and the act of Congress.

("Conclusion of law," at close of findings; Record, p. 9, at foot.)

The Attorney General for the appellee has assigned error, and to maintain such assignment, argues: first, that the United States are not responsible for the acts of their military commanders; and, second, if they be responsible, still the acts constituted no injury for which the claimant is entitled to recover; and third, that the claimant cannot maintain any suit in the Court of Claims.

Points for Appellee.

I.

The ship was detained by the commanding general.

The detention was by withholding a clearance, for want

of which, if the ship had sailed, she would have been seized and declared forfeited.

Proclamation and Treasury Regulations, (12 Stat., 1264.)

On the 15th of September the master applied for clearance, "which, in consequence of the orders of the commanding general, was refused, without any reasons for the refusal being then assigned by the collector." (Findings, Record, p. 5, near top.)

"On the 20th of September the collector of customs informed said consul that the commanding general would not permit the ship to leave port with certain cases on board designated in his order, and that consequently the collector was compelled to refuse a clearance."

Findings, Rec., p. 5.

"All the refusals by the collector of customs to grant a clearance of said ship were made in obedience to the orders of the said commanding general."

Finding of the Court, Rec., p. 9; see also General Butler's letter of September 19. Findings of the Court, Rec., p. 6.

II.

The detention was the means adopted by the commanding general to compel, without any exhibition of force, the master to deliver up the packages of bullion and plate which had been shipped and for which the master had signed bills of lading.

The Prussian consul having stated to General Butler that the master of the vessel apprehended that he would make the vessel liable for the value of the goods, if they should be surrendered voluntarily, in obedience to the deputy collector of customs, suggested that they might be taken by force. General Butler replied: "I shall not use force to take the obnoxious packages out of the Essex,

because I believe that very force would be made a subject of complaint; but I repeat what I have already said, until the master of the Essex deliver those packages to the custom house officer, the ship cannot sail, and if he remains, as he is now doing, it must be at his own risk and peril."

Findings, Rec., p. 7.

III.

Had the master delivered them up without the return of the bills of lading or order of the shipper he would have rendered the vessel and the owners liable for their value.

Nothing excuses the failure of the ship to deliver the goods shipped, except the act of God or of the public enemy.

It is said (appellant's brief, p. 12, V.) that "only the shippers could sue on the bills of lading, and there would have been a complete defence as to them." Citing Thompson *vs.* Dominy, and Dows *vs.* Cobb. These cases hold only that the shipper only can enforce the contract to transport. The consignees or endorsees of the bill of lading if the property had passed to them may maintain an action for the detention or conversion of the goods, and the bill of lading is *conclusive* evidence that the master had the goods. (Tindall *vs.* Taylor, 4 E. & B. 219; cited in Parsons on Ship. & Adm.)

In Abbott on Shipping it is intimated that consignees may, in some cases, maintain an action upon the contract for transportation. "There is often some difficulty in deciding to whom the master and owner are responsible on their contract, evidenced by their bill of lading, and whether action for loss or injury occasioned by their negligence or misconduct should be brought by the consignor or consignee. No rule of general application, can be laid down for the solution of this difficulty, &c," p. 326.

But, if liable to the shippers only, we do not see what defence the master could have even as to them, had they sued in Liverpool, as they would have done.

Being notified that the goods would not be taken from the ship, the question presented to the master was simply whether he would give up the goods to purchase a clearance. We submit that had he delivered the goods for that purpose, having the option to do otherwise, the master would have been liable for their value.

That his voluntary delivery of the goods would have been inexcusable is shown by the fact that no goods were taken, except one package, for which the bills of lading were surrendered and one for which the order of the shipper was obtained. The others were not taken, and were thus saved to the owners.

On the 6th of October, clearance was refused, unless packages 11, 13 and 14 were taken out, which the master refused to do, but next day he was informed that he could clear, "as the military authorities allowed him to clear the ship with the remaining portion of the freight on board, and the ship was cleared on that day."

Findings, Record, p. 8.

IV.

The master acted in entire good faith and was anxious to comply with the requirements of the commanding general if he could do so with safety to his owner. "The said captain asked some of the shippers of said freight to give back to them the bills of lading he had signed therefor; but they said they had sent them on to Liverpool."

Findings, Rec., p. 9.

V.

If the authorities of the United States had the right to detain the ship in order to prevent the suspected articles from going forward, then the case falls under the 13th article of the treaty of 1828 with Prussia, which provides that "it shall be lawful to stop such vessels and articles and to detain them for such length of time as the

captors may think necessary, to prevent the inconvenience or damage that might ensue from this proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors."

(See opinion of the Court, Rec., pp. 10, 11.)

VI.

If the right to compensation is given by the treaty this claimant may recover in this suit.

His claim is referred to the Court by Congress with power to award damages. The award, if made at all, must, under this act, be to him, for his is the only claim before the Court that could be brought under the act. No award can be made to any other person.

Rights, secured by treaty to individuals, can be asserted by them, directly, without the intervention of the foreign Government with which the treaty was made. The act of March 3, 1863, withdrawing from the jurisdiction of the Court of Claims claims "growing out of or dependent on any treaty stipulation," except claims pending in that Court on the 1st of December, 1862, is a legis lative recognition of the right of private persons to enforce in that Court demands, growing out of treaty stipulations. The books are full of cases arising under the treaties with Great Britain, with Spain, and with France, in which rights secured by treaty to individuals have been protected by the courts.

In Foster and Elam *vs.* Neilson, this court said:

"A treaty is, *in its nature*, a contract between two nations, not a legislative act. It does not *generally* effect of itself the object to be accomplished, especially so far as its operation is infra-territorial, but it is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the

land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court." 2 Pet., 313–4.

The right not to be detained was given by the treaty which, as to this, executed itself. To pay for the detention required legislative action, which is given in the act in this case of May 4, 1870.

VII.

But, independent of the treaty of 1828—

The necessity of the detention, if it was neccessary, justified the military commander, but did not, therefore, relieve the United States from liability. On the contrary, it fixed the liability of the United States.

"There are undoubtedly occasions in which private property may be lawfully taken or destroyed to prevent it from falling into the hands of the public enemy, aud also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the Government is bound to make full compensation to the owner, but the officer is not responsible."

(Mitchell *vs.* Harmony, 13 How. 115, 134.)

VIII.

But, if not originally liable by reason of the justifiable detention of the vessel, still by section of the act of July 27, 1868, Congress relieved the commanding general of all liability, and thereby took the liability upon the Government.

That act provides that no action shall be maintained in any court by any alien or other person against any officer on account of any act done by him under color of any acts of Congress relative to the said insurrectionary States or persons or property therein. 15 Stat., 248.

This act protects officers against just demands, and the United States cannot be presumed to have intended to do this except by assuming the liability of which they relieve their officers.

IX.

It may reasonably be considered that the act in this case has a broader scope than even this, viz.: that it is intended to assume the payment of damages if the claimant be entitled as against any person. This claim was, as the Court of Claims sets forth, in its findings of fact, the subject of diplomatic correspondence between the Governments of the United States and Prussia before the joint resolution was passed, authorizing suit in Court of Claims. It is not unreasonable to take the very words of the joint resolution, as expressing its intent, viz.: that if the claimant's vessel was, as alleged, detained by the military authority, at New Orleans, and, if he has been damaged by such detention —which damage is to be damage in a legal sense—then the Court is to award him damages against the United States.

X.

The question whether the suit is for tort or breach of contract seems to us irrelevant. Nothing is said of tort or contract either in the act of Congress or in the petition. The act authorizes the court to award damages, and damages are recoverable alike for the commission of a tort or the breach of a contract, and both of these are wrongs.

XI.

There was nothing in the condition of affairs at New

Orleans to subject this claimant to any exceptional liability.

It is true that New Orleans was, in some sense, a conquered territory, but so it was when the general, Butler, proclaimed as the law of the place, "that all rights of property of whatever kind will be held inviolate, subject only to the laws of the United States." And, again, "All foreigners, not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the Confederate States, will be protected in person and property, as heretofore, under the laws of the United States," and, said the Court, "these clauses only reiterated the rules established by the legislative and executive action of the national Government in respect to the portions of the States in insurrection, occupied and controlled by the troops of the Union. * * * It was the re-establishment of the national authority."

The Venice, 2 Wall., 276–7.

And in that condition of things the President issued his proclamation opening the port to foreign trade, and prescribing the conditions under which such trade could be carried on. It has never been suggested that the claimant violated those conditions.

Of course all private rights were held in subjection to the military governmen; but rights of property were not annihilated; they existed, and when the property was taken or detained, a right of compensation accrued.

Conclusion.

We submit that the judgment of the Court of Claims should be affirmed.

J. M. CARLISLE,
J. D. McPHERSON,
For Appellee.

3. Masters Law p 316

6. Saunders 629

6 Wheaton 571

2. Curtis p 459

Halleck Law of war — p 27